A **BANK INDUSTRI & TEKNOLOGI MALAYSIA BHD**

v.

WILMONT SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[SUIT NO: D8-22-1606-2003]
30 AUGUST 2005

C ***BANKING:*** *Securities for advances - Loan facility - Plaintiff bank granted 1st defendant a term loan facility - Joint and several guarantee by 2nd, 3rd and 4th defendants - Default of payment by 1st defendant - Whether plaintiff entitled to summary judgment against defendants - Whether there were triable issues - Rules of the High Court 1980, O. 14*

D ***CIVIL PROCEDURE:*** *Summary judgment - Loan facilities given by plaintiff bank - Joint and several guarantee - Default of payment by 1st defendant - Whether plaintiff entitled to summary judgment - Whether there were triable issues - Rules of the High Court 1980, O. 14*

E This was an appeal by the defendants against the decision of the Senior Assistant Registrar granting the plaintiff's application for a claim of RM698,437.79 with interest, under O. 14 of the Rules of the High Court 1980. Pursuant to a letter of offer and a facility agreement, the plaintiff, at the request of the 1st defendant, had F granted the 1st defendant a term loan facility of RM730,000; the 2nd, 3rd and 4th defendants guaranteed the payment of the whole sum *via* a joint and several guarantee. Upon default by the 1st defendant, the plaintiff sent the defendants letters of demand, and subsequently, terminated the facility and demanded payment G amounting to RM734,284.96. The defendants contended: (i) that the facility agreement was not in compliance with the 1st defendant's memorandum and articles of association; (ii) that no letters of demand were issued by the plaintiff; (iii) that the plaintiff's failure to appoint a receiver and manager for the 1st H defendant, and take consequential steps to realize the 1st defendant's assets, was in breach of the terms of the terns of the debenture given under the facility agreement and hence unenforceable; (iv) that the plaintiff's claim against the guarantors under the facility agreement could not be enforced since it had I varied and breached the terms of Schedule 1 of the debenture; (v)

that the plaintiff's action herein was invalid and premature; and (vi) that the certificate of indebtedness was incorrect as the same did not comply with cls. 13.3 to 13.5 of the facility agreement.

Held (dismissing the appeal):

(1) As long as the plaintiff had entered into the facility agreement with the 1st defendant in good faith, there was no burden or obligation whatsoever imposed on the plaintiff in law to enquire as to whether the 1st defendant had complied with the provisions of the 1st defendant's memorandum and articles of association. The plaintiff, as an outsider, could not be held accountable for the 1st defendant's internal affairs. In the circumstances of this case, the defendants were accordingly estopped from asserting that the provisions of the 1st defendant's memorandum and articles of association had not been complied with. It could not, by law, be a basis for all the defendants to escape liability under the facility agreement and the guarantee. (paras 9 & 10)

(2) The defendants' contention that no letters of demand were issued by the plaintiff was absolutely baseless and frivolous since the plaintiff had issued them to the defendants in accordance with the terms of the facility agreement and the guarantee. Further, since the notice of demand was served in compliance with the express terms of the contract read together with the deeming clauses, the aforesaid notice should be regarded as issued and received. (para 11, 12 & 13)

(3) The failure of the plaintiff to appoint a receiver and manager over the assets of the 1st defendant under the debenture did not affect the liability of the 1st defendant to the plaintiff under the facility agreement or the liability of the 2nd, 3rd and 4th defendants to the plaintiff under the guarantee. The plaintiff was under no contractual obligation and owed no duty to the defendants to appoint a receiver and manager under the debenture or to sell the assets of the 1st defendant at any particular time to realize the amount due under the loan facilities. (paras 15 & 20)

(4) Clause 9.07 of the guarantee was wide enough to allow the plaintiff to modify or vary Schedule 1 of the debenture without prejudicing its right against the guarantors. As the guarantors

had given a continuing guarantee, their liability was not in any way diminished or reduced by the variation of Schedule 1 of the debenture. (para 29)

(5) The 1st defendant had indisputably defaulted in making payments thereby making the sum outstanding immediately due and repayable; therefore, the plaintiff was entitled to immediately demand payment of all sums due under the facility from the defendants. The plaintiff's action was thus valid and not premature. (para 32)

(6) The defendants had only raised bare assertions and had not condescended to particulars to show, by way of evidence, any error in the computation as set out in the certificate of indebtedness. A bare denial was insufficient and it is an established principle that the affidavit showing cause against an O. 14 application must condescend to particulars. (para 35)

(7) Based on the aforesaid reasons, the defendants had failed to raise any issue that merited the trial of the matter. This was a proper case for the grant of a summary judgment. (para 36)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***

Bolton Finance Bhd v. Kenneth James Banker [1997] 4 CLJ Supp 99 HC ***(refd)***

China South Sea Bank Ltd v. Tan Soon Gin (alias George Tan) [1990] 1 AC 537 ***(refd)***

Citibank NA v. Ooi Boon Leong [1981] 1 MLJ 282 ***(refd)***

Freeman & Lockyer (A Firm) v. Buckhurst Part Properties (Mangal) Ltd and Another [1964] 2 QB 480 ***(refd)***

Keppel Finace Ltd v. Phoon Ah Lek [1994] 3 MLJ 37 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 CA ***(refd)***

Malayan Banking Bhd v. Edaran Pit Stop Sdn Bhd & Ors [2000] 1 CLJ 234 HC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff - Brandon Siva (Amir Md Salleh with him); M/s Kadir Andri & Partners

For the defendants - J Chandra; M/s Mahendran & Fernandez

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Said J:

[1] This is the defendants' appeal against the senior assistant registrar's decision on 9 August 2004, granting the plaintiff's O. 14 application.

[2] The plaintiff claims RM698,437.79 as at 31 August 2003, interest at 7.5 p.s. from 1 September 2003 until full settlement. By a letter of offer dated 28 September 1999 and facilities agreement dated 11 November 1999, the plaintiff, at the request of the 1st defendant granted to the 1st defendant a term loan facility. The RM730,000 facility was to enable the 1st defendant to pay part of the price for the purchase of machines and equipment for rubber wood furniture.

[3] By a joint and several guarantee dated 11 November 1999, the 2nd, 3rd and 4th defendants guaranteed the payment of the whole sum.

[4] The 1st defendant neglected to pay the sum due and owing under the facility. The plaintiff sent a letter of demand dated 5 February 2003. The plaintiff terminated the facility and demanded payment of RM734,284.96. A letter of demand was also sent to the 2nd, 3rd and 4th defendants on the same date.

[5] The 1st defendant contended that the facility agreement was not in compliance with the Memorandum and Articles of Association. The facility agreement was duly executed between the 1st defendant and the plaintiff with the authorization of the 1st defendant by way of a "board resolution" of the 1st defendant exhibited as exh. "MA1".

[6] The letter of offer and the facility agreement were duly executed by the 2nd defendant on behalf of the 1st defendant. At the material time, the 2nd defendant was the Managing Director for the 1st defendant.

[7] Learned counsel for plaintiff referred to the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 where Edgar Joseph Jr FCJ held at p. 826:

Now, the main plank in the argument advanced by Dr Das for the Purchaser was the Rule in *Royal British Bank v. Turquand* [1856] 119 ER 474, which protects outsiders dealing with a company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular.

At this point, we would interpolate to observe that the effect of the Rule in *Turquand*'s case is that it reduces the enquiries which outsiders having dealings with a company – or more correctly – outsiders who reasonably think they are having dealings with a company – must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum of articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering and it is this which provides the legal basis for the Rule.

In *Turquand*, the deed of settlement (corresponding to the modern articles of association) had given permission to borrow subject to a general resolution of the company authorizing the same. The bank had lent money to the company upon the security of a bond signed by two directors and given under the seal of the company. In an action brought by the Bank to recover the money lent, the company had contended that no resolution of the kind required had been passed. In reply, the lender relied on the usual authority of directors. The Court of Exchequer Chamber held that the lender was entitled to succeed; this was because the company was bound by the contract since the bank was entitled to infer that the necessary resolution had been passed.

[8] He also made reference to the English case of *Freeman & Lockyer (A Firm) v. Buckhurst Part Properties (Mangal) Ltd and Another* [1964] 2 QB 480, Wilmer LJ held at p. 491 that:

It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of association, which are public documents open to inspection by all. But by the rule in *Royal British Bank v. Turquand*, re-affirmed in *Mahoney*'s case, it was also established, in the words of Lord Hatherly in the latter case, "that when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company.

[9] As long as the plaintiff had entered into the facility agreement with the 1st defendant in good faith, there is no burden or obligation whatsoever imposed on plaintiff in law to enquire as to whether the provisions of the 1st defendant's Memorandum and Articles of Association has been complied with by the 1st defendant. The plaintiff as an outsider cannot be held accountable for the 1st defendant's internal affairs.

[10] I agree that in the circumstances of this case, the defendants are accordingly estopped from asserting that the provisions of the 1st defendant's Memorandum and Articles of Association have not been complied with. It cannot by law be a basis for all the defendants to escape liability under the facility agreement and the guarantee.

[11] The defendants' contention that no letters of demand were issued by the plaintiff is absolutely baseless and frivolous. The letters of demand have been duly issued by the plaintiff to the defendants in accordance with the terms of the facility agreement and the guarantee. The said letters of demand and proof of posting had been exhibited as "RM4" and "RM5". As to service of the letters of demand cl. 16.5 and 16.6 of the facility agreement provides that any notice sent to the addresses stated therein is deemed to have been received within two days following the date of posting against 1st defendant. In respect of 2nd, 3rd and 4th defendant, cl. 10.01(c) of the guarantee provides that any notice sent to the addresses stated therein is deemed to have been received within three days following the date of posting.

[12] As to how the notice is to be effected and the effect of such deeming clause is found in *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1, where the Supreme Court held that:

> It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.
>
> On the meaning of the words "shall be deemed" in cl. 17, it would seem clear to us from the authorities that they mean "shall be regarded as".

[13] Since the notice of demand is served in compliance with the express terms of the contract read together with the deeming clauses, the aforesaid notice shall be regarded as issued and received.

[14] The defendants alleged that the plaintiff's failure to appoint a receiver and manager for the 1st defendant, and take consequential steps to realize the 1st defendant's assets was in breach of the terms of the debenture given under the facility agreement and hence unenforceable. This again is frivolous.

[15] The failure of the plaintiff to appoint a receiver and manager over the assets of the 1st defendant under the debenture does not in this case affect the liability of the 1st defendant to the plaintiff under the facility agreement or the liability of the 2nd, 3rd and 4th defendants to the plaintiff under the guarantee. The failure to exercise their rights to appoint and realize the properties by sale under the debenture do not affect the liability of the defendants to the plaintiff. The plaintiff has the right to appoint a receiver and manager. It is a right which it is entitled to exercise. This right is independent of its other recourse to recover the amount.

[16] Clause 10.1 of the debenture clearly provides that the rights, powers and remedies of the plaintiff shall not be impaired or construed to be waived by any delay in exercising nor any omission to exercise any of the plaintiff's rights, powers, privileges or remedies under the debenture.

[17] Similarly, cl. 9.07(d) of the guarantee stipulates that the plaintiff may at any time deal with, exchange, release, modify or abstain from perfecting or enforcing any securities or other guarantees or rights the plaintiff has against the defendants without in any way affecting the plaintiff's securities or rights.

[18] Learned counsel for plaintiff next referred to Privy Council case of *China South Sea Bank Ltd v. Tan Soon Gin (alias George Tan)* [1990] 1 AC 537, where Lord Templeman held at p. 545 that:

> In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. *All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.* If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. *If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when*

> *he should sell*. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

[19] On the obligation of the pledgee to sell the shares, VC George J in *Keppel Finace Ltd v. Phoon Ah Lek* [1994] 3 MLJ 37 referred to cl. 13 of both the loan agreements, and said:

> When the security created by this agreement shall become enforceable the lender shall without prejudice to any other remedies ... Forthwith be entitled as and when they shall think fit with or without notice to all or any of the following:
>
> > It is to be noted that in the loan agreement the provision is not that the plaintiff shall forthwith sell and dispose of the securities or words to like effect but that the plaintiffs shall forthwith 'be entitled as and when they shall think fit ... to sell and dispose of the securities.' The memorandum of deposit does not provide that the plaintiffs 'shall sell'.

[20] Therefore the plaintiff is under no contractual obligation and owes no duty to the defendants to appoint a receiver and manager under the debenture or to sell the assets of the 1st defendant at any particular time to realize the amount due under the loan facilities. Clause 10.1 and 9.07 gave the plaintiff absolute right to determine which of the remedies it proposes to take.

[21] It is undisputed that one Lim Tian Huat of Messrs Ernst & Young was appointed as the Receiver and Manager of the 1st defendant by Hong Leong Bank Bhd. The defendants contend that the appointment of the Receiver and Manager is invalid under the debenture.

[22] The machinery of the 1st defendant secured under the Debenture and Supplemental Debenture was sold for RM148,250. Upon deductions for costs, fees and expenses, the net proceeds received by the plaintiff from the said sale was RM64,789.50. A copy of a report prepared by the receiver and manager detailing the amounts received and deductions made to the proceeds from the sale of the machinery is exhibited as "NMS4". Adequate notice for the sale of the machinery was provided by the receiver and manager by way of the advertisement. The defendants' contention is therefore again baseless and frivolous.

[23] If the defendants have any grievances over the appointment of the said receiver and manager, the same should be addressed to Hong Leong Bank Bhd and not the plaintiff. Whether the appointment of the receiver and manager by Hong Leong is valid or invalid is a non issue to the plaintiff's claim against all the defendants. There is nothing to prevent the plaintiff from proceeding concurrently with a civil suit after having appointed a receiver and manager under the debenture. In *Bolton Finance Bhd v. Kenneth James Banker* [1997] 4 CLJ Supp 99, a receiver was appointed by the plaintiff pursuant to a debenture while at the same time the plaintiff sued both the guarantors under the facility. The defendants in this case raised the same issue.

[24] In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, the Court of Appeal cited with approval *China & South Sea Bank Ltd. v. Tan (supra)* on the creditor's unfettered rights to enforce all the remedies at any time or times simultaneously or contemporaneously or successively or not at all. Effectively the plaintiff could after exercising its powers under the debenture appoint a receiver and manager and next proceed with all the remedies available including even a statutory sale under the National Land Code. It is for the plaintiff to decide if and when it proposes to do so and is perfectly entitled to do so without perejudice to all its simultaneous rights.

[25] The 2nd, 3rd and 4th defendants as guarantors of the facility agreement contended that Schedule 1 of the debenture was varied by the Supplemental Debenture and the said defendants as guarantors did not consent to this variation. As the terms of the debenture had been varied and breached by the plaintiff without their consent, the plaintiff's claim against the guarantors under the facility agreement cannot be enforced.

[26] A perusal of cl. 9.07 of the guarantee shows that the plaintiff may at all times deal with, exchange, release or modify any securities held by the same without discharging or affecting the liability of the 2nd, 3rd and 4th defendants as guarantors.

[27] In *Citibank NA v. Ooi Boon Leong* [1981] 1 MLJ 282. The Federal Court held:

In any event, the contract of guarantee contains express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing its right against the respondents. Clause 8 provides that the bank may recover from the respondents notwithstanding any failure on its part to take any security or that any security given to the bank is invalid. Clause 16 enables the bank at its absolute discretion and without notice to or consent of the respondents to vary or alter the contract between the bank and the company and that any rights of the respondents which is inconsistent with the terms of the contract has been waived by them. In other words there was voluntary waiver of the rights of the respondents to be subrogated on payment of the loan.

Accordingly where the respondents have promised to waive any variation or alteration and the bank has proceeded with the performance of the contract on that basis it would be in our opinion inequitable to allow them to resile from the contract.

[28] In the case of *Malayan Banking Bhd v. Edaran Pit Stop Sdn Bhd & Ors* [2000] 1 CLJ 234, RK Nathan J held:

The guarantee contained a clause that the plaintiff was at liberty to "... determine, enlarge or vary any credit ...." Without having to obtain the guarantor's consent. By signing the guarantee, the fourth defendant had expressly agreed that the plaintiff need not revert to him or obtain his consent to determine, enlarge or vary any credit. The words contained in the guarantee are wide enough to cover the situation where the plaintiff varies the interest rates imposed on the banking facilities given to the principal debtor.

[29] The same legal principle in the said authority is applicable in our case. Clause 9.07 of the guarantee are wide enough to allow the plaintiff to modify or vary Schedule 1 of the debenture without prejudicing its right against the guarantors. As a continuing guarantee had been given by the guarantors, their liability is not in any way diminished or reduced by the variation of Schedule 1 of the debenture.

[30] The defendants contend that the term of the facility is for five years and that the plaintiff commenced the action herein before the completion of the said term. The defendants also contend that the plaintiff did not make a declaration of default. The defendant therefore alleges that the plaintiff's action herein is invalid and premature.

[31] Notwithstanding the provisions stipulated in cl. 3.4 of the facility agreement, the provisions of cl. 13.1 of the same provides that any sums outstanding from the defendants to the plaintiff under the facility shall become immediately due and repayable to the plaintiff in the event the 1st defendant defaults in making payment.

[32] Indisputably, the 1st defendant defaulted in making payments thereby making the sum outstanding immediately due and repayable therefore plaintiff is entitled to immediately demand payment of all sums due under the facility from the defendants. Sufficient notice has been issued to the defendants pursuant to cl. 13.2 of the facility agreement. The letter dated 5 February 2003 issued by the plaintiff to the defendants clearly declares the 1st defendant's default. There was breach of the facility agreement by 1st defendant and accordingly this action is valid and not premature.

[33] On the Certificate of Indebtedness the defendant contended that it is incorrect as the same does not comply with cls. 13.3 to 13.5 of the facility agreement.

[34] Clauses 13.3 to 13.5 of the facility agreement are provisions relating to the enforcement of security by the plaintiff. The said clauses are irrelevant to and do not affect the plaintiff's rights in this action to demand payments of sums due from the defendants in the event of default by the 1st defendant to make payments under the facility. Additionally, the said clauses are therefore inapplicable to the Certificate of Indebtedness. Clause 16.1 of the facility agreement provides that the certificate of indebtedness as conclusive and again cl. 9.04 of the guarantee provides that a statement of account in writing showing the sums due and owing from the 1st defendant is conclusive and binding on the 2nd, 3rd and 4th defendants.

[35] The defendants have raised only bare assertions and have not condescended to particulars to show by way of evidence, any error in the computation as set out in the Certificate of Indebtedness. It is trite without particularizing the error no evidence of manifest error could be shown and therefore the certificate is conclusive. I agree with the plaintiff that it is insufficient for the defendants to make a bare assertion that the interest is wrong. He has to condescend to particulars of how or why the amount due is incorrect or without basis. Bare denial is

insufficient. It is an established principle that the affidavit showing cause against an order 14 application must condescend to particulars.

[36] Based on the aforesaid reasons, I am satisfied that the defendants had failed to raise any issue that merits the trial of the matter. This is a case proper for the learned senior assistant registrar to grant summary judgement. The appeal is thereby dismissed with costs.